

Castlepoint Ins. Co. v 621 East, LLC

2013 NY Slip Op 32898(U)

November 8, 2013

Supreme Court, New York County

Docket Number: 157606/2012

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: _____
Justice

PART _____

Index Number : 157606/2012
CASTLEPOINT INSURANCE COMPANY
vs
621 EAST, LLC
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/8/13

CK, J.S.C.
CYNTHIA S. KERN
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

Index No. 157606/12

-against-

DECISION/ORDER

621 EAST, LLC, MAURICE MEKENZI and HANNAH
THOMAS,

Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion.....	<u>2,3,4</u>
Replying Affidavits.....	<u>5,6,7</u>
Exhibits.....	<u>8</u>

Plaintiff Castlepoint Insurance Company (“Castlepoint”) commenced the instant action seeking a declaration that it has no duty to defend or indemnify defendants 621 East, LLC (“621”) and Maurice Mekenzi (“Mr. Mekenzi”) in connection with an underlying action brought by defendant Hannah Thomas (“Ms. Thomas”). Castlepoint now moves for an Order pursuant to CPLR § 3212 for a judgment that it has no duty to defend or indemnify 621 and Mr. Mekenzi. Ms. Thomas cross-moves for an Order pursuant to CPLR § 3212 declaring that Castlepoint is obligated to defend and indemnify 621 in the underlying action. Mr. Mekenzi also cross-moves for an Order pursuant to CPLR § 602 consolidating the instant action with the underlying action. Finally, 621 cross-moves for an Order pursuant to CPLR § 3025 for leave to amend its answer to

allege certain affirmative defenses. For the reasons set forth below, Castlepoint's motion for summary judgment is granted, Ms. Thomas' cross-motion for summary judgment is denied, Mr. Mekenzi's cross-motion for consolidation is denied and 621's cross-motion to amend its answer is denied.

The relevant facts are as follows. In or around November 2008, Castlepoint issued a Commercial Lines insurance policy to 621, bearing policy number CPG7004501-08, effective November 20, 2008 through November 20, 2009 (the "Policy"), as owner of a building located at 621 East 170th Street, New York, New York (the "subject premises"). Pursuant to the Policy, the insured has liability coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'" caused by an "occurrence," which the Policy defines, in pertinent part, as an "accident." Additionally, the insured's liability coverage is based on its compliance with the following condition:

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or "suit" and the date received; and
 - (2) Notify us as soon as practicable.You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

On or about November 13, 2009, Ms. Thomas, a tenant at the subject premises, allegedly sustained personal injuries when a portion of the ceiling collapsed in the apartment where she resided (the "incident"). By letters dated December 22, 2009 and July 26, 2010, Ms. Thomas' attorney, Evan Foulke, notified 621 and Mr. Mekenzi of the incident and requested that they forward notice of the incident to Castlepoint as the insurance carrier for the subject premises. In or around August 2010, Ms. Thomas commenced an action in Bronx County Supreme Court against 621 and Mr. Mekenzi seeking to recover damages for the injuries she sustained in the incident (the "underlying action"). The complaint in the underlying action alleged that she sustained said injuries when the ceiling in her apartment "suddenly and without warning collapsed and fell on top of her causing her to fall to the floor" and that said injuries were caused by the negligence of 621, the alleged owner, and Mr. Mekenzi, the alleged managing agent, in their ownership, control and maintenance of the subject premises. 621 was served with the complaint in the underlying action through the Secretary of State on November 4, 2010. Mr. Mekenzi appeared by service of his answer dated November 22, 2010. As a result of its failure to appear, on or about October 20, 2011, Ms. Thomas moved for a default judgment against 621 in the underlying action. By Decision and Order dated November 17, 2011, Ms. Thomas' motion was denied for failing to demonstrate compliance with notice pursuant to CPLR § 3215(g)(4)(i) and was granted leave to renew. On or about April 11, 2012, Ms. Thomas moved to renew her application for a default judgment against 621. Additionally, Mr. Mekenzi moved for summary judgment on the ground that he was not employed by 621 on the date of the incident. However, the court denied Mr. Mekenzi's motion as premature and a subsequent motion to renew and reargue that decision was denied as well.

Castlepoint alleges that it was first notified of the incident on May 7, 2012 when it received a facsimile transmission from its agent, Morstan General Agency, Inc., which included a cover letter from 621's insurance broker, Follman Insurance Brokerage, Inc., dated May 7, 2012, enclosing a first notice package. Said package included a copy of the ACORD General Liability Notice of Occurrence/Claim Form, the Policy's renewal certificate, the summons, complaint and affidavits of service in the underlying action, Ms. Thomas' motion for a default judgment and order denying the motion as well as the renewal application and two letters to Mr. Mekenzi requesting that he place his carrier on notice of the incident. However, the ACORD did not indicate when 621 or Mr. Mekenzi received the initial notice of the incident.

Plaintiff alleges that on May 7, 2012, a file was assembled and sent to the claim examiner, Nancy Hicks and that on that same date, Ms. Hicks called Paul Sohayegh ("Mr. Sohayegh"), 621's principal, and Ms. Thomas' attorney, to gather information regarding the incident and discuss the claim and potential coverage issues. Based on its investigation, plaintiff alleges it confirmed that 621 and Mr. Mekenzi had knowledge of the incident via Ms. Thomas' attorney's letters, which were purportedly mailed to them on December 22, 2009 and July 26, 2010, as well as 621's receipt of the pleadings in the underlying action via the Secretary of State on November 4, 2010 and Mr. Mekenzi's answer dated November 22, 2010. Thus, on May 15, 2012, plaintiff mailed the disclaimer letter, based on late notice, to 621 and counsel for Mr. Mekenzi and Ms. Thomas. Plaintiff then appointed counsel to defend 621 in the underlying action pending resolution of the instant action, filed on October 16, 2012, seeking a declaratory judgment that it has no obligation to defend and indemnify 621 or Mr. Mekenzi in the underlying action based on the late notice of the incident.

The court first turns to Castlepoint's motion for an Order pursuant to CPLR § 3212 for a judgment that it has no duty to defend or indemnify 621 or Mr. Mekenzi in the underlying action. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, Castlepoint has established its prima facie right to a judgment that it has no duty to defend or indemnify 621 or Mr. Mekenzi in the underlying action on the ground that the defendants failed to comply with the notice provisions in the Policy. "For years the rule in New York has been that where a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." *Argo Corp. v. Greater New York Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (2005). "Strict compliance with the contract protects the carrier against fraud or collusion; gives the carrier an opportunity to investigate claims while evidence is fresh; allows the carrier to make an early estimate of potential exposure and establish adequate reserves and gives the carrier an opportunity to exercise early control of claims, which aids in settlement." *Id.* (internal citations omitted). "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy, and the

insurer need not show prejudice before it can assert the defense of noncompliance.” *Security Mutual Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440 (1972)(internal citations omitted). In the instant action, Castlepoint has established that it has no duty to defend or indemnify 621 or Mr. Mekenzi because it did not receive timely notice of the incident or the underlying action. Castlepoint has alleged that 621 and Mr. Mekenzi received knowledge of the incident via Ms. Thomas’ attorney’s letters, which were sent to them on December 22, 2009 and July 26, 2010 notifying them of the incident. Additionally, plaintiff alleges that notice was provided to 621 when it was served with the pleadings in the underlying action via the Secretary of State on November 4, 2010 and that it is undisputed that Mr. Mekenzi received notice of the incident because he answered the complaint in the underlying action in November 2010. However, Castlepoint did not receive notice of the incident until May 7, 2012.

In response, defendants have failed to raise an issue of fact sufficient to defeat plaintiff’s motion for summary judgment. 621’s assertion that it failed to timely notify Castlepoint of the incident because it did not receive notice of the incident until May 2012 is without merit. As an initial matter, counsel for Ms. Thomas mailed letters advising 621 of the incident in December 2009 and again in July 2010. Even if these letters cannot constitute notice to 621 as they “were sent to the apartment of Mekenzie at 507 186th Street, Apt A4, New York, NY 10033” but “Mekenzie...had not been the managing agent for the premises since December 7, 2007 and this was not 621’s address,” 621 received notice of the incident when Ms. Thomas commenced a lawsuit against it and served it with the pleadings via the Secretary of State on November 4, 2010. Although 621 asserts that it never received the pleadings in the underlying action because its correct address was not on file with the Secretary of State, such argument is without merit. It

is well-settled that service on an insured through the Secretary of State establishes the absence of any excuse as to receipt, even if such service failed to result in actual notice to the insured. See *Briggs Ave. LLC v. Insurance Corp. of Hannover*, 11 N.Y.3d 377 (2008). A presumption of receipt arises once service is completed on the Secretary of State irrespective of whether it is actually received by the corporation's representative. See *26 Warren Corp v. Aetna Cas. & Sur. Co.*, 253 A.D.2d 375, 376 (1st Dept 1998) ("the receipt of service of the summons and complaint by the Secretary of State, as plaintiff's designated agent, constituted receipt by a representative within the meaning of the policy. The fact that plaintiff itself did not actually receive a copy, due solely to its own failure to notify the Secretary of State of a change in address of its representative to whom the Secretary was authorized to forward process, does not excuse its noncompliance with the notice requirement of the policy"). 621's assertion that it requested its managing agent to update its address with the Secretary of State is without merit as "it is a corporation's obligation to keep on file with the Secretary of State the current address of an agent to receive service of process..." *Cedeno v. Wimbledon Bldg. Corp.*, 207 A.D.2d 297, 298 (1st Dept 1994). Thus, it may be presumed that 621 had notice of the underlying action as early as November 2010 when it was served with the pleadings via the Secretary of State. However, Castlepoint was not informed of the incident until May 2012, nearly a year and a half after the underlying action was commenced.

Mr. Mekenzi's assertion that Castlepoint's motion for summary judgment is premature as no finding has been made about whether he is covered under the Policy is without merit as such determination has no bearing on whether Castlepoint has a duty to defend or indemnify him in the underlying action. As an initial matter, Bronx County Supreme Court Justice Lucindo Suarez

has already found that the issue of whether Mr. Mekenzi was an agent of 621 at the time the incident occurred is an issue of fact to be determined at trial in the underlying action. If it is found in the underlying action that Mr. Mekenzi was not an insured under the Policy because he was not an agent of 621 at the time of the incident, Castlepoint would be entitled to a judgment that it has no duty to defend or indemnify Mr. Mekenzi. Further, if it is found in the underlying action that Mr. Mekenzi is an insured under the Policy because he was an agent of 621 at the time of the incident, Castlepoint would still be entitled to a judgment that it has no duty to defend or indemnify Mr. Mekenzi based on Mr. Mekenzi's failure to notify plaintiff of the incident "as soon as practicable" as it is undisputed that Mr. Mekenzi had notice of the underlying action at least as early as November 2010 based on his appearance in that action.

Additionally, Ms. Thomas' assertion that she provided notice of the incident when "she acted diligently in attempting to ascertain CastlePoint's identity" and tried to notify Castlepoint of the incident also fails to raise an issue of fact sufficient to defeat Castlepoint's motion. "An injured party...has an independent right to notify an insurance carrier of an accident." *Tower Ins. Co. of N.Y. v. Lin Hsin Long Co.*, 50 A.D.3d 305, 308 (1st Dept 2008); *see also* Insurance Law § 3420(a)(3). "However, 'the injured party is required, in order to rely upon that provision, to demonstrate that he or she acted diligently in attempting to ascertain the identity of the insurer, and thereafter, expeditiously notified the insurer.'" *Tower Ins. Co. of N.Y.*, 50 A.D.3d at 308, citing *Steinberg v. Hermitage Ins. Co.*, 26 A.D.3d 426, 428 (2d Dept 2006). Here, Ms. Thomas has not established that she acted with such diligence. Ms. Thomas asserts that her diligence in attempting to notify Castlepoint is evidenced by the two letters sent by her attorney to 621 and Mr. Mekenzi notifying them of the incident and requesting that they "notify [their] insurance

carrier of Thomas' claim" and a letter sent by her attorney to Mr. Keypour enclosing the pleadings in the underlying action and requesting that he "please put this in the hands of [his] commercial general liability carrier right away to provide them with notice of this claim." However, these letters are insufficient to raise an issue of fact as to whether Ms. Thomas acted diligently in notifying plaintiff as Ms. Thomas' attorney never requested the name of the insurance carrier or attempted to contact it directly. Additionally, Ms. Thomas has not demonstrated, either through the letters or otherwise, any additional efforts on her part to identify the carrier through other means. Such conduct by the injured party demonstrates a failure to exercise reasonable diligence in providing notice to an insurance carrier. *See Tower Ins. Co. of N.Y.*, 50 A.D.3d at 310 ("the undisputed fact that [the injured party's] counsel never even requested from the insured the name of its insurance carrier (nor undertook additional efforts to identify the carrier) compels the conclusion that [the injured party] did not exercise reasonable diligence.") Further, Ms. Thomas failed to cure her delay by providing notice to plaintiff on May 31, 2012 as plaintiff had already received notice of the claim from 621 and disclaimed coverage.

The court now turns to the cross-motions made by the defendants. As an initial matter, Ms. Thomas' motion for summary judgment must be denied as this court has already granted Castlepoint's motion for summary judgment. Further, Mr. Mekenzi's cross-motion to consolidate this action with the underlying action is denied on the grounds that he has not provided a basis for such relief and that such request is moot as this court has granted plaintiff's motion for summary judgment which disposes of the instant action in its entirety.

Finally, 621's cross-motion to amend its answer to assert the affirmative defenses of a justifiable belief there would be no lawsuit and justification in not providing timely notice of the

incident because it did not receive notice of the lawsuit must be denied as this court has already found such defenses to be unavailing and without merit in its analysis of Castlepoint's motion for summary judgment. Additionally, that portion of 621's cross-motion to amend its answer to assert the affirmative defense of estoppel must also be denied as it is patently devoid of merit. Pursuant to CPLR 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010). 621's third proposed affirmative defense claims that Castlepoint should be estopped from asserting its coverage defense because Castlepoint provided representation for 621 in the underlying action. However, such proposed amendment is patently devoid of merit as Castlepoint advised 621 of its coverage position at the outset of the claim when it mailed out its disclaimer letter on May 15, 2012 and only undertook its defense of 621 pursuant to the Policy pending the outcome of the instant action. Therefore, any reliance on such representation in the underlying action by 621 is unavailing and insufficient as a defense to this action.

Accordingly, Castlepoint's motion for summary judgment is granted; Ms. Thomas' cross-motion for summary judgment is denied; Mr. Mekenzi's cross-motion for consolidation is denied; and 621's cross-motion for leave to amend its answer is denied. The Clerk is directed to enter judgment in favor of Castlepoint and against defendants. This constitutes the decision and order of the court.

Dated: 11/8/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.